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IN THE

UNITED STATES SUPREME COURT.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE AND F. R. COUDERT, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY,

Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS, et al.,

Defendants in Error.

BRIEF OF DEFENDANT IN ERROR

Kansas City, Kansas, is a city of the first class, having a population of over 30,000. It was formed by a consolidation of three cities situated so that lines drawn connecting them form a triangle. Situated at a point almost in the center of this triangle, the Union Pacific Railway Company owned three tracts of land, aggregating about 170 acres, used in part for shops and other railway purposes and in part vacant. This land situated almost in the center of the city was attempted to be taken into the corporate limits in 1887, but the company appealed and the Supreme Court of Kansas in 1889 held that under the then existing laws the city could not take the Union Pacific lands into the city against the protest of the company.

U. P. Ry. Co. vs. Kansas City, 42 Kansas, 497.

At the session of the Kansas legislature in 1891 the law given in full in the brief of plaintiff in error, page 2, was passed, providing a way to take property into cities of the first class and repealed the former law, under which Kansas City had made its first attempt to incorporate the Union Pacific lands as part of the municipality. In 1892 Kansas City, again attempted to take the Union Pacific lands into the city, resulting in the instituting of the present suit, in the State Court, calling in question the law of 1891, both as being in conflict with the State and Federal Constitutions.

Before entering on a discussion of the merits of this appeal we desire to present a question as to the jurisdiction of this court.

Judgment appealed from is not a final judgment or order, and is not reviewable in this court.

The defendants, The City of Kansas City, The County Treasurer and County Clerk of Wyandotte County and the Board of Education of the City of Kansas City, demurred to the petition in the Court of Common Pleas of Wyandotte County, Kansas, on the ground that the petition did not state facts sufficient to constitute a cause of action. The defendants, the Township of Wyandotte and School District No. 9, failed to answer or plead at any time, or in any way, to the petition of the plaintiffs. The Court of Common Pleas overruled the demurrer filed by the defendants above named, and thereupon said defendants elected to stand on their demurrer (page 29 of record), and appealed from said ruling to the Supreme Court of the State of Kansas, which court made the following order:

"This case comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that this case be remanded with instructions to sustain the demurrer to the petition. It is further ordered that the defendants in error pay the costs of this case in this court taxed at $....., and hereof let execution issue."

At the close of the opinion of the Supreme Court, delivered by Doster, C. J., it is said:

"The judgment of the court below was wrong, it is reversed with directions to sustain the demurrer to the petition."

From the above order and judgment, directing the Court of Common Pleas to sustain the demurrer to the petition, the plaintiffs in error asked and were allowed a writ of error to this court. So far as the record shows the plaintiffs in error did not, either in the Supreme Court nor in the court below, elect in any way to stand on their petition. The record does not show that the court of Common Pleas of Wyandotte County has as yet entered an order sustaining the demurrer to the petition, or that any final judgment has been entered in the case as against the plaintiffs, or in favor of or against any of the defendants. No judgment sustaining the demurrer to the petition, or rendering any other judgment in the case, has been in fact made. The defendants in error contend that the judgment of the Supreme Court of Kansas, from which this appeal is taken, is not a final judgment such as will be reviewed on the writ of error by this court. It is conceded of course, that the judgment from which the defendants in error appealed to the Supreme Court of Kansas, by reason of their election to stand on their demurrer, was, for the purposes of their appeal, a final judgment. The judgment from which the plaintiffs in error have appealed is entirely different in its character; it determines only a question of pleading. The petition of the plaintiffs below is not dismissed, nor are any directions given by the Supreme

Court as to whether or not such petition shall be dismissed. The rights of the plaintiffs in error as against the defendants in error, Wyandotte Township and School District No. 9, have not been determined, and as to these defendants the plaintiffs in error are probably entitled to a perpetual injunction, enjoining them from collecting any tax on the lands in controversy. It is provided by Sec. 141 of Chapter 95, General Statutes of Kansas, of 1897, as follows:

"If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

Under this statute, and the well settled practice in Kansas, the plaintiffs in error are entitled to amend their petition on the entry of the judgment in the court below sustaining the demurrer, and to set up new matter in their petition, to which the defendants in error would be required to plead, and after which a trial might be had as to issues of law or fact or both, before the entry of any final judgment. The right of a party to appeal to this court from an order sustaining or overruling a demurrer, has, we believe, been finally determined by this court in several cases.

In the case of the heirs of De Armas vs. United States, 6 Howd., 103, it was decided:

"An order of a district court sustaining a demurrer to a petition because it was multifarous, and because the

names of the persons claiming or in possession of the land which the petitioners allege to belong to them were not set forth, was not a final judgment or decree, from which an appeal lies to this court."

Mr. Chief Justice Taney, delivering the opinion of the court, among other things referring to the judgment appealed from, said:

"But evidently that judgment is not a final judgment or decree, for the petition is not dismissed, nor is the title of the petitioners to the land claimed by them finally adjudicated, nor their right to locate the same number of arpents upon the public domain. Nothing is decided but a question of pleading and a question as to proper parties. The petition appears to be still pending in the district court; and the objections upon which the court decided against the petitioners might be removed, if the appellants desire it, by an application to the court for leave to amend. But if the petitioners did not move for leave to amend, and preferred taking the opinion of this court upon the questions decided against them in the district court, then, under the opinion given by that court upon the demurrer, it should have proceeded to pass a final decree dismissing the bill. An appeal from that decree would have brought the case legally before this court, and authorized it to examine the grounds upon which the decree had been made. But as there is no final judgment or decree, we have no jurisdiction, and consequently the appeal must be dismissed."

The case of Meagher vs. The Minnesota Thresher Manufacturing Company, 145 U. S., 608; 12 S. Ct., 876, is a case in principle decisive of the case at bar. The decision in that case was as follows:

"The judgment of the State Supreme Court affirming an interlocutory order, overruling a demurrer with permission to plead further, is not an appealable final judgment, however decisive of the merits it may appear to be."

"Before an appeal can be prosecuted by any one or more of several defendants, the case should be determined as to all."

By the statute above referred to, the plaintiffs in error on the entry of the order sustaining the demurrer to their petition, were entitled to amend either with or without costs, as the court might direct.

In the recent case of Werner vs. Charleston, 151 U.S., 360; 14 S. Ct. R., 356, it was sought to review a judgment of the Supreme Court of the state of South Carolina, affirming a judgment overruling a demurrer. This court held:

"A judgment of a State Supreme Court affirming a judgment overruling a demurrer to a complaint for want of facts constituting a cause of action, is not an appealable final judgment."

In Rice vs. Sanger, 146 U. S., 197, 12 S. Ct. R., 664, it was held:

"A judgment of a State Supreme Court reversing and remanding a case for further proceedings, is not a final judgment, and will not be reviewed by the Supreme Court of the United States, especially after a second trial has been had below."

We ask that this appeal be dismissed for the reason that judgment appealed from is not a final judgment.

In Bostwick vs. Brinkerhoff, 106 U. S., 3; 1 Sup. Ct. Rep., 13, it is said:

"The rule is well settled and of long standing that a judgment or decree to be final within the meaning of that term, as used in the acts of Congress, giving this court jurisdiction on appeals and writs of error must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

See also Keystone Magnese & Iron Co. vs Martin, 10 S. Ct., 32; Chicago & N. W. Rly. Co. vs. Osborne, 146 U. S., 354; Brown vs. Baxter, 146 U. S., 619; Miners Bank vs. United States, 5 Howd., 215, and Tyler vs. Hand, 7 Howd., 537.

As far as the alleged conflict with the State Constitution is concerned, that question of course was illiminated from the case by the decision of the Kansas Supreme Court. So that the one question now left is whether the paragraph in the law of 1891 reading: "but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," vitiates the entire law by reason of making it in conflict with the Fourteenth amendment to the Federal Constitution forbidding a state to deny "to any person within its jurisdiction the equal protection of the laws," or to deprive him of his property without due process of law.

Plaintiffs in error claim that the classification made by the Kansas statute puts lands used for agricultural purposes and owned by individuals in one class and all other lands in another, permitting the latter class to be taken into a city and refusing to permit the former. This certainly is a forced and unfair construction of the law. The statute providing how certain lands can be incorporated within a city, says: "but nothing in this act shall be held to apply to any tract or tracts of land used for agricultural purposes" and then the clause is added: "when the same is now owned by any railroad or other corporation." The plain intent was to place land in two classes, those used for agricultural purposes and those not so used, and the last sentence quoted above is added by way of an exception from the class used for agricultural purposes, and was probably added as an amendment after the law had been prepared. If this last exception was stricken out all the objections urged against the law by plaintiff in error would virtually be removed.

The right of the legislature to classify the lands which are to be taken into the city and to say that certain classes of lands should be taken in, and that certain other classes should not, is not disputed. The only restriction is that the classification must be reasonable, not arbitrary, but based on some difference as stated by Mr. Justice Brewer in Rld. Co. vs. Ellis, 165 U. S., 65, which bears "a reasonable and just relation to the act in respect to which the classification is proposed." The classification in this case

of all lands used for agricultural purposes in one class and all other lands in another is not arbitrary, but on the contrary is certainly based on reasonable grounds. The benefits which accrue to lands within the limits of a city, are such that they would be of no value whatever, to lands used for agricultural purposes. Police protection, access thereto by means of graded and paved streets, the benefit of street lights or city water are of absolutely no value to lands used for agricultural purposes, while the increased tax which all these conveniences of modern city life necessitate, would be an almost insupportable burden to the owner of such lands.

It is urged that the same objection would obtain as to vacant lands, but practically this is not so. It is a matter of common knowledge that vacant lands situated with reference to large cities, as those which would be affected by the terms of the law of 1891, are chiefly valuable on account of their proximity to such a city, and the possibility or probability that they will become available as city property. The fact that such lands have the benefit of all these modern conveniences would enhance their value. In addition to this, from the standpoint of the City, vacant and unoccupied lands might become the rendezvous of tramps and vicious characters generally, and if situated within the limits of an incorporated city, and yet not a part of it, the police would be absolutely powerless to make arrests or in any way prevent the establishment of this nuisance in its very midst. There are as good reasons why lands on which manufacturing plants are situated, necessitating the

gathering together of large numbers of men and the construction of large buildings where fires can originate, demanding the assistance of the fire department maintained by the city, in order to put it out, if for no other reason, to prevent its spreading to the adjacent property in the city. This is peculiarly well illustrated by the facts in this case. The Union Pacific shops and switch yards filled with cars are in the heart of the city, and liable at any time to call on the city for fire protection, but paying no part of the expense of maintaining the city government and in no way subject to the city regulations for the proteotion against fire or the maintenance of order. These and many other reasons of a similar nature might have moved the legislature to have excepted agricultural lands and included vacant and all other classes of lands.

It is quite possible that some inequalities and hardships will result from this classification, but that would be so in any classification of which we could conceive. Justice McKenna in a very recent case, Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 18 Sup. Ct. Reporter, 598, says:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And, necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Is the classification as made by the Kansas Legislature, into lands used for agricultural purposes in one class and

all others in another, so unreasonable, so unjust and so arbitrary, that the court can say that the State of Kansas denies to any person the equal protection of the law? If the legislature had the right and has not offended against the fourteenth amendment by classifying lands used for agricultural purposes, in one class and those not so used in another, and denying cities of the first class the right to incorporate the former within their limits and granting the right to incorporate the latter, then the law of 1891, can stand providing the last clause excepting from the classification lands used for agricultural purposes, when owned by railroads or other corporations, is not so connected with and dependent on the rest of the law as a condition, consideration or compensation, that it can be held bad and the other provisions enforced.

The Supreme Court of Kansas held, at least by inference, that this clause from the law of 1891, quoted above might be objectionable, yet, the Union Pacific Railway Company, its lands not being used for agricultural purposes, was in no way affected by this objectionable part and was therefore not in a position to raise the question of its constitutionality. In other words, that the objectionable part might be rejected and the remainder of the law enforced. Whether this could be done, to a great extent, depends upon the legislative intent. To illustrate, if the excepting of lands used for agricultural purposes when owned by railroads or other corporations from the general class of agricultural lands, which cities of the first class are not

permitted to take into the city limits by said law of 1891 was largely instrumental in the passage of, and intimately associated with the entire act as an inducement therefor; then the law would have to stand or fall, as an entirety. But if said exception was merely incidental, if the legislative intent was to pass a law providing a better way for cities of the first class to incorporate adjacent territory within the city limits, and the exception was without special import, for instance, an amendment ingrafted in the law, by some statesman who considered his special work in life was "to down" railroads and other corporations, or by some friend of the Union Pacific Railway Company in the legislature, with a view to bringing the present suit, then the objectionable part could be disregarded without vitiating the entire law.

We have called attention to some events antecedent to the passage of the law of 1891, and of which the court may properly take judicial notice, and which we think may properly be considered as showing the why and wherefore of the passage of said law. A law somewhat similar to this had been a part of the laws of Kansas, relating to cities of the first class for years, and when the decision of the Supreme Court in Union Pacific Ry. Co. vs. Kansas City, supra, brought out its weak point, the legislature at its next session amended it. The law is general in its nature, and had for its purpose to afford an expeditious and effective way for a city of the first class to incorporate adjacent territory within the city limits.

Chief Justice Shaw in Warren vs. Charleston, 2 Gray, 84, quoted with approval by this court in the income tax cases, 158 U. S., 601, says the unconstitutional part of the law and the balance of a law in order to be void, must be "so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect, the legislature would not have passed the residue independently."

What "condition, consideration, or compensation," could there be between the residue of the law in question in this case and the taking in or leaving out of lands used for agricultural purposes and owned by railroad companies, or other corporations. The "conditions, considerations or compensations" between the different parts of a law referred to as prohibiting the sustaining of a part and rejection of the remainder is well illustrated in Slauson vs. City of Racine, 13 Wisconsin, 398, cited by plaintiff in error in their brief. Certain farming lands were attached to the city of Racine by act of the legislature and the constitutionality of the act was under consideration. It was claimed that part might be permitted to stand and part, virtually conceded to be void by reason of being in conflict with the constitution, rejected. The court held the contrary, quoting the rule laid down by Chief ustice Shaw, cited above and explained the reason why it applied in that case. The Court said:

"The first section of the act (Chap. 83, Pr. Laws, of 1856), provided that the tracts in question shall be annexed to the city. The second defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of one-half of one per cent. There is no doubt that in many instances by the annexation of farming lands to a city, hardships are inflicted upon their owners by the increased rates of taxation to which they are subjected. If they are annexed, they must be taxed as other lands in the city, and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation and stronger language could not be well selected to show that the legislature intended the one to be subject to the condition stated in the other, and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso. For these reasons we think the principle stated applies, and the act should be held inoperative."

The connection between the good and bad parts of the law in this Wisconsin case, is very apparent, but we fail to see any similar relationship between the parts of the act under consideration, and certainly the plaintiffs in error have failed to show any.

In Mesheimer vs. The State, 11 Ind., 482, also cited by the plaintiffs in error, the court say:

"The proposition that a statute may be good in part and in part void because unconstitutional, is not contro-

verted. It is established by numerous authorities. Commonwealth vs. Kimball, 24 Pic., 301; Fisher vs. McGuir, 1 Gray, 22; Armstrong vs. Jackson, 1 Blackft, 374; Clark vs. Ellis, 2 id., 8.) But it would seem that the provision of the statutes to be held constitutional should be substantially the same when considered by themselves, as when taken in connection with other parts of the statute held to be unconstitutional, or in other words, when that part of a statute which is unconstitutional so limits and qualifies the remaining portion that the latter when stripped of such unconstitutional provisions is essentially different in its effect and operation from what it would be were the whol law valid, it would seem that the whole law should fall."

Does the portion of the law of 1891, excepting lands used for agricultural purposes when owned by railroads and other corporations, so limit and qualify the remaining portion that the latter, if stripped of that provision, would be essentially different in its effect and operation from what it would be were the whole law valid? It would permit cities of the first class to exercise a power to which they have always had the right under the laws of Kansas. Its manner and mode of exercising said right would be the same, its effect would be the same on all except certain corporate entities, with respect to which they would not be permitted to exercise their power under such circumstances as it is claimed would deprive them of their property without due process of law or deny to them the equal protection of the law. This certainly cannot be held to be essentially different in its effect and operation.

Mr. Cooley, in his work on Constitutional Limitations, says:

"A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohitited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution, of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last may fall. The point is not whether they are contained in the same section; for the distributions into sections is purely artificial; but whether they are essentially and inseperably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."—Cooley's Constitutional Limitations, p. 210.

See also,

Rood vs. McCargar, 49 Cal., 117.
Robinson vs. Bidwell, 22 Cal., 379.
The People vs. Kenny, 96 N. Y., 294, 302.
State, ex rel. vs. Tuttle, 53 Wis., 45.
Donnersberger vs. Pendergast, 129 Ill., 229.

In all these cases it seems that when the purpose and intent of the law in question will be carried out without material modification by permitting the good parts to stand and rejecting the bad, this will be done. Modifications of the operation in minor details will not be considered sufficient to declare the entire law bad and thus defeat the enforcement of a wholesome and proper statute as it would in this case.

The Supreme Court of Kansas construing the statute of 1891 holds that portions of the act alleged (see page 6 of record) to be in conflict with the Constitution of the United States, is severable from the rest of the act. That the plaintiffs in error can not question the validity of the whole act because the case they present does not come within the terms of the one portion of the law, which they challenge in their petition and assignments of error as unconstitutional. The plaintiffs in error are complaining of the construction placed by the Supreme Court of Kansas on the law in this case. The construction so placed on the statute in question is final, and this court will not review or reverse it, even if it is not correct. The correctness of our contention is best shown by the decisions of this court in similar cases.

In the case of St. Paul, Minneapolis & Manitoba Rly. Co. vs. Todd County, 142 U. S., 282, it was held that a decision of a Supreme Court of a state, exempting the property of a railway company from taxation, but deciding that a certain class of property did not come within the terms of exemption, is not an impairment of the contract by the laws of the state, and is not subject to review in error in the Supreme Court of the United States.

In the opinion in this case by Mr. Chief Justice Fuller, it said: "It is conceded that the Supreme Court of Minnesota did not base its decision on the ground that there was not a valid contract between the state and the company, exempting its property from taxation, but held that the exemption claimed did not attach to these lands, and it is argued that if such lands are within the contract of exemption contained in the company's charter, then the obligation of that contract was impaired by the assessment under chapter 11 of the general laws of the state, and the decision of the Supreme Court holding that the lands were subject to assessments under such laws. Our jurisdiction cannot be maintained upon this view, as is stated by Mr. Justice Gray speaking for the court in New Orleans Water Works Company vs. Louisiana Sugar Refining Company, 125 U. S., 30.

"In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract be impaired,

but it must have been impaired by a law of the state, the prohibition is aimed at the legislative power of the state and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals, and the language of Mr. Justice Miller in exposition of the rule is quoted from two opinions of the court delivered by him."

" 'It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States, and the decision of the state court must sustain the law in the matter in which the conflict is supposed to exist, or the case for this court does not arise.' "

In the case of Central Land Company vs. Laidley, 159 U. S., 103, it is decided that this court has no jurisdiction of a writ of error to a state court on the ground that the obligation of a contract has been impaired when the validity of the statute, under which the contract was made, is admitted, and the only question is of its construction by that court.

In this case Justice Gray, delivering the opinion of the court, said:

"The power delegated to us, is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

In Winona & St. Peter Land Company vs. Minnesota, 159 U. S., 526, in which the opinion was delivered by Justice Brewer, it was claimed that the provisions of Ch. 5 of the Laws of Minnesota of 1881, providing for the collection of back taxes, were void, the defendant complained of taxes

levied against its real estate, and argued that the provisions of the law in question, relative to the collection of unpaid taxes on personal property were void as being in conflict with the Constitution of the United States, and that the provision of the law relative to the collection of unpaid taxes on real property were also void. The Supreme Court of Minnesota held that the provision of the statute with reference to the real and personal property were separable, and that the provision of the statute, with reference to real property were valid, and could be enforced even though the provisions of the statute, with reference to personal property, were void. In the opinion it is said:

"The Supreme Court of the state was of the opinion that even if the tax on personal property was not collectable under the provisions of the tax law for the reason claimed, yet there was at least a valid tax which, in the absence of any law providing another method, might be enforced by an ordinary personal action. . . . ."

"It may well be that the legislature, in view of the probabilities of the changes in the title or situs of personal property, might deem it unwise to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate if it did so, it violates no provision of the federal constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the state."

In Noble vs. Mitchell, 164 U. S., 367, the court had occasion to consider a statute of the State of Alabama regulating the subject of fire and marine insurance within the

state. The state court held that the provisions with reference to this subject were separable, and that construing the different laws of the state regulating the business of insurance by foreign corporations, and that so construed there was no conflict between the statute and the Constitution of the United States. In the opinion, on page 371, it is said:

"The action below was predicated upon the fact that the business of insurance had been done by foreign corporations, the Supreme Court of Alabama in interpreting the statute held the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. It said: 'It is contended, however, by Secs. 1207 of the code, supra, these provisions of the law are made to include associations and partnerships as well as corporations, and in this respect discriminates against citizens of any state who may compose such partnerships, and in this respect is violative of the constitutional provision which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.'

"We construe Sec. 1207 as amendatory of the sections to which it refers, so as to substitute the words corporations, associations or partnerships, for the words insurance company. Thus considered Sec. 1205, supra, would read as follows: any person who solicits insurance on behalf of the corporation or partnership not incorporated by the laws of this state, etc., and Sec. 1206, supra, would read: any person acting as agent for any foreign corporation, association or partnership which have, etc.'"

"By holding Sec. 1207 as amendatory of the other sections referred to in a manner declaring Secs. 1205 and 1206 are separable in their provisions, and so far as they are made to apply to and are enforced against foreign corporations, they do not contravene any provisions of the state

Constitution or the Constitution of the United States. This construction of the Alabama statute, although made by the Supreme Court of that state, it is urged is erroneous, and we are invited to disregard it but the interpretation of a statute of the state of Alabama by the Supreme Court thereof, under the circumstances here presented, is binding on us."

The first ground of the decision of the Supreme Court of Kansas does not involve any federal question.

"One claiming that a state statute is void for want of due process of law, is limited solely to the inquiry whether in the case presented by himself, the statute has operated to deprive him of his property without due process; and the court will not consider whether, in a different case, the act might so operate." Del Castillo vs. McConnico, 168 U. S., 674; 18 S. Ct., 229.

The first proposition of law decided by the Supreme Court of Kansas, as shown by the syllabus, is as follows:

"One cannot be heard to complain that a statute which discriminates between the classes of persons in the imposition of burdens of municipal control and taxation is unconstitutional as being a denial of the equal protection of the law, unless he belongs to one of the classes discriminated against."

The judgment is really based on this proposition: It was not necessary for the court to decide the question raised as to the constitutionality of the law. The decision on this proposition did not involve any federal question, and is therefore binding and conclusive on this court, and prevents a review of this case in this court.

The plaintiffs in error allege in their petition (page 5, record), that their lands are adjacent to the boundaries of the city; that certain portions of their lands (page 10, record) attempted to be included in the city under the ordinance, described on pages 5, 6, 7, 8 and 9 of the record, "are vacant and occupied lands held for railroad purposes, and that the balance of said lands (page 9, record) are used for railroad purposes; that a copy of the ordinance annexing the lands, the tax on which are in controversy (page 6, record), is attached to their petition. The preamble to the ordinance (page 14, record) is as follows:

"Whereas, a certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the City of Kansas City, Kansas, and is so situated as to be bounded on three-fourths (¾) of its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens."

The plaintiffs in error by these allegations show clearly that no part of the lands attempted to be included in the city under the ordinance were agricultural lands. Therefore, conceding for the purpose of argument only, that the whole of the exception found in the last part of section 15, and which reads as follows, "that nothing in this act shall be taken or held to be applied to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation," means what the plaintiffs claim, and is void, the plaintiffs are not injured or affected by its invalidity.

Nothing in the act has been taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same was owned by any railroad or other corporation. The portion of the law which the plaintiffs complain of has not been acted upon, and its validity is wholly immaterial in this case. If the lands annexed were agricultural lands owned by the plaintiffs, then a case would exist, where the validity of this part of the law would be material and the plaintiffs would be entitled to have its validity determined by the courts.

The right of the plaintiffs to present the question which they seek to do as to the validity of this part of the statute, must result from some injury done to them through these alleged illegal provisions.

The law on this point is clearly stated by Cooley in his work on Constitutional Limitations, 6 Edt., pages 196 and 197, in discussing the rules governing courts in declaring statutes unconstitutional, it is said:

"Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

"The statute is assumed to be valid, until some one complains whose right it invades. Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his

property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only it is necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose."

In Pittsburg, C., C. & St. L. Rly. Co. vs. Montgomery, 49 N. E., 582, it is decided:

"Where an act fixing the liability of all corporations except municipal is valid as to railroad corporations included therein, the question as to its validity with regard to other corporations cannot be raised by a railroad company."

The plaintiffs in error (pages 37, 38 and 39, brief) say that the discrimination in regard to agricultural lands does affect them. That their lands will be subject to the burdens of city taxation. The argument that the plaintiff's property will be subject to increased taxation was considered in Kelly vs. Pittsburg, 104 U. S., 17, and it was held:

"A state has power to determine what portion of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate of taxation at which such property shall be assessed."

"A party is not deprived of his property without due

process of law by the enforced collection of taxes, merely because they in individual cases work hardships or impose unequal burdens."

In Forsyth vs. Hammond, 166 U. S., 506, which was a proceeding to prevent the collection of taxes on certain land over which the city of Hammond had extended its territorial limits, it is held:

"The matter of the territorial boundaries of a municipal corporation is local in its nature, and as a rule is to be finally and absolutely determined by the authorities of the state."

The petition of the plaintiffs in error did not allege any tender of the taxes admitted to be due, and is for that reason demurrable.

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it." Eustis vs. Booles, 150 U. S., 362.

If the general demurrer filed to the petition can be sustained on any ground which does not involve the consideration of a federal question, this court will not review the decision of the Supreme Court of Kansas, as to the constitutionality of the law.

We contend that the petition is demurrable, for the reason that it does not contain any allegation of payment

or tender by the plaintiffs in error of taxes admitted by them to be lawfully due.

First—There is no allegation or tender of the taxes levied for state or county purposes. The correctness of the assessed valuation of the property is not disputed, and no complaint is made as to the rate of taxation for state or county purposes.

The petition should contain an allegation of the payment or tender of these taxes, and without it is fatally defective.

Second—The plaintiffs in error should have alleged a payment or tender of the city or township taxes due on their property. It was taxable whether in the city or out of it. The valuation and rate of taxation was fixed and the tax due on either theory, as to the validity of the ordinance easily computed. The plaintiffs in error should have, if their property was in the city, paid taxes on it according to the rate of taxation fixed by the city authorities, if it was in Wyandotte Township, they should have paid according to the rate of taxation fixed by the township officials. They were bound to know, as a matter of law, whether or not their land was in the city, and to act accordingly.

The plaintiffs cannot be allowed to escape payment of taxes for years by alleging that they do not know the location of their own lands with reference to the city limits, nor by alleging that there is a conflict between the municipal authorities as to which of them had jurisdiction to tax such lands.

This is especially true in this case where both the township and city authorities had levied a tax and an opportunity to pay, or at least to offer to pay on either basis of taxation, was presented.

Third—The petition shows that a portion of the lands included in the ordinance extending the city limits, was real estate owned by the Union Pacific Railway Company, and not used or necessary to be used in the daily operation of said railway, and therefore subject to assessment for taxation by the city or township authorities, and that another portion of the lands included in said ordinance was real estate assessable only by the State Board of Railway Commissioners.

The petition further shows that the State Board of Railway Commissioners assessed the lands assessable by them and included within the ordinance, as though the same were in the Township of Wyandotte.

The petition further shows (page 10, record) that the total assessed valuation of the road bed, right of way, and other property assessed and returned by the State Board of Railway Commissioners of Wyandotte Township, was $233,612.00, and that of this amount $110,968 was for lands included in the ordinance. Deducting the amount of assessed valuation alleged to have been so made for the lands included in the ordinance, from the total assessed valuation, and there remains an assessed valuation of $122,644.00, on which there would be due to Wyandotte Township $1,103.79, and to School District No. 9, $613.22, regardless

of the decision of the questions involved in this case. The petition contains no allegation of payment or tender of this portion of the tax, the validity of which is admitted by the petition.

Fourth—The plaintiffs in error allege the taxes levied by the defendant Wyandotte Township, and School District No. 9, on the land in controversy, not assessed by the Board of Railway Commissioners, were valid and that they were extended upon the tax rolls (page 11 of record), and that the county treasurer "proposes to and will collect the amounts of said city and school taxes levied against said property as aforesaid."

The allegation as to the levy, extension on the tax roll, and attempt to collect the tax levied by the school district, amounting to $686.10, is clear and positive. Should not the plaintiffs allege a payment or tender of this tax? They concede its validity; and allege the willingness of the treasurer to accept it.

The plaintiffs in error, as an excuse for not paying or offering to pay this tax, allege that of the $686.10 levied by the school district, $554.84 was tax on lands included in the ordinance extending the city limits. Conceding this contention to be correct, there would still be due to the school district on the property of the plaintiffs within the limits of said school district, and not included in the ordinance, a tax of $131.16. The petition does not show any payment or tender of this tax admitted to be due to the school district, regardless of the result of this suit. The

same situation existed in regard to the tax of Wyandotte Township. The total amount of the tax levied by the township according to the petition, was $2,102.44, and it is further alleged that of this amount $998.71 was tax on land included in the ordinance extending the city limits. It would follow that there would be due to the township on property not included in the ordinance, taxes amounting to $1,103.72.

There is no allegation of payment or tender of this tax of $1,103.72, also admitted to be due, regardless of the result of this suit.

The plaintiffs seek to escape liability for the payment of any taxes, and to avoid the necessity of alleging a payment or tender of any portion of their taxes, some of which are admitted to be valid and due, by alleging, first, that they do not know the location of their own lands, and, second, that there is a dispute as to which tax is legal. Under the laws of Kansas a person must pay all of his taxes, state, county and city, and cannot pay, nor can the county treasurer receive payment of any particular tax or taxes, leaving a portion of the total tax unpaid.

In Julien vs. Ainsworth, 27 Kan., 446, the plaintiff's total tax was $105.87. He disputed the validity of $19.03 of that amount levied to pay certain railroad bonds. He alleged in his petition a tender to the county treasurer of $86.87, the amount of his taxes less the railroad bond tax, and that the treasurer refused to receive said amount. Mr. Justice Brewer, delivering the opinion of the court, said:

"The question presented is whether a taxpayer can at his option tender to the county treasurer a part of the taxes assessed upon any specific property, and compel him to receive and receipt for such portion."

The law as declared in the syllabus of this case on this point is as follows:

"A taxpayer has no right to tender to a county treasurer a portion of his taxes, and compel a receipt therefor. The treasurer may decline to receive such part tendered, or to give any receipt, unless the entire amount of the tax is paid, or the taxpayer exercises the option given by Sec. 91 of the tax law, of paying one-half thereof before the 20th day of December."

The proper practice and pleading in cases of this character was also pointed out by Justice Brewer in the opinion of this case on page 449, it is said:

"If the plaintiff desires, as counsel say, to contest the validity of any particular tax or part thereof, his proper remedy is to tender the remaining taxes, as he did in this case, and then bring his action for an injunction, keeping good his tender, and showing wherein the taxes not tendered are illegal, and no proper charge upon his property. Then if his claim of illegality is sustained, an injunction will be ordered restraining the collection of such illegal tax, and the treasurer may then receipt for such taxes tendered and admitted to be legal. In no other way can proper protection be secured to the officer and the public."

In the recent case of Franz vs. Krebs, 41 Kans., 233, which was an action to enjoin the county clerk from issuing a tax deed on a tax sale certificate on property of the plaintiff, and which certificate was claimed to be illegal, because a part of the tax, for which the property was sold, was an

illegal special assessment, levied by the City of Atchison. The plaintiffs offered on the trial to make good the offer made in their petition as to the payment of the taxes conceded to be legal and due. The trial court found that the plaintiff failed to pay or tender the second half of her general taxes.

The Supreme Court of Kansas in its opinion delivered by Chief Justice Horton, said:

"It is conceded that all the taxes levied upon the real estate for which it was sold, were legal, except the special macadam tax. It has been frequently decided by this court that an action will not lie to set aside a tax-sale certificate or restrain a tax proceeding, without a prior payment, or tender, of all the legal taxes admitted to be due and payable. In this case the amount of legal taxes are not in dispute, and therefore the rules applicable to other cases generally will be applied to this."

"Evidently the plaintiff was guilty of laches, in failing to pay or tender the second half of her general taxes admitted to be legal and due."

In Hagaman vs. Comm'rs. of Cloud Co., 19 Kan., 394, which was an action to enjoin the assignment of tax sale certificates, it is decided:

"Equity will not as a rule interfere to restrain by injunction the assignment of tax-sale certificates on real estate, where the property is subject to taxation, on the ground of irregularities in the assessment and the levy of the taxes and the proceedings of the sale, unless the party seeking equitable relief shall first pay or tender the taxes which are admitted to be due, or just, or which the court finds from the evidence ought to be paid."

In the opinion of this case, delivered by Chief Justice Horton, the law on this question as declared by this court is quoted and approved. It is said:

"No evidence was offered that the taxes were wholly illegal and void; neither was it alleged in the petition, nor proven on the trial, that the plaintiff had paid or tendered any part of the taxes. The defendants demurred to the evidence of the plaintiff. The court sustained the demurrer; and we are asked to reverse such ruling."

"Upon familiar principles, and by the repeated decisions of this court, the plaintiff is not rightly entitled to the relief demanded until he has done that justice, or offered to do it, which he exacts from others. He who seeks equity, must do equity. The action of the court in sustaining the demurrer was correct"

The recent case of Albuquerque vs. Perea, 147 U. S., 87; 13 S. Ct. R., 194, is decisive as to the effect of the allegations of the plaintiff's petition by which they seek to avoid the necessity of alleging a tender of the taxes admitted to be due. This case is in principle identical with this. Mr. Justice Brewer, declaring the opinion of the court, quotes from the petition of the plaintiffs the following, which is very similar to the allegations of the petition in this case:

"That the amount of its taxes upon the assessment as made by the board of equalization is the sum of $2,189, and that the amount of the assessment which your orator should justly pay for its said property, if lawfully, equitably, and justly assessed, would be the sum of $1,532.30, which said sum your orator brings into court, and hereby tenders."

"And your orator further alleges that the said assess-

ment and said tax roll are so made out that it is impossible to separate the property upon which your orator is justly and lawfully taxed, and the taxes upon which are justly and lawfully levied, from the balance of the taxes assessed against your orator; but whatever sum may be ascertained by the court to be justly due from your orator on account of taxes for the year 1889 your orator is ready and willing to bring the same into court and is ready to pay the same."

The defendants demurred to the bill in this case, and their demurrer was sustained, and the bill dismissed, and this decision was affirmed by the Supreme Court of the Territory of New Mexico, and from this decision an appeal was taken. In the opinion, Justice Brewer, having stated the facts of the case, among other things, said:

"With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes—an allegation which is manifestly untrue—in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way, and in view of tthe further fact that it must have known what property it had which was subject to taxation as well as its value, and therefore the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In State Railroad Tax Cases, 92, U. S., 575, 616, it was fully considered. In that case it was said by Mr. Justice Miller, speaking for the court: 'It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should

be permanently enjoined, submit to pay the balance. This is not equity. It is a direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping that with which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full of all the taxes assessed.' "

The case of the Northern Pacific Railway Company vs. Clark, 153 U. S., 252, 14 S. Ct. Rep., was a suit by the Northern Pacific Railway Company to enjoin the collection of taxes alleged to be illegally assessed against its lands. The circuit court sustained a demurrer to the bill and dismissed it for want of equity. In this case the bill showed that the railway company was liable to pay taxes either on a percentage of its gross earnings or to pay a tax upon its land as other property of like character was assessed. The bill did not allege a tender of taxes on either basis of taxation. Mr. Justice Jackson, delivering an opinion of the court, said:

"Being liable to pay either a percentage on gross earnings in accordance with the provisions of the act of 1889, or a tax upon its land as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation.'

If a judgment is correct it will not be reversed on appeal, even if the court below based it on incorrect reasons. The petition of the plaintiff being demurrable for want of any allegation of tender or payment of the taxes admitted to be valid, and the question thereby presented not being a federal question this appeal should be dismissed.

For the reasons given we respectfully submit that the appeal should be dismissed or that the decision of the Supreme Court of Kansas should be affirmed.

T. A. POLLOCK and
F. D. HUTCHINGS,
Attys. for Defts. in Error.